Supreme Court, U.S.
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86-606

CASE NO. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1986

JAY NELL LOCKE, Petitioner

v.

MESA PETROLEUM COMPANY, et al.,
Respondents

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER OR NOT ENTRY OF SUMMARY JUDGMENT BY A SUCCESSOR JUDGE IN A NON-JURY TRIAL ON THE BASIS OF TESTIMONY HEARD BY THE FORMER JUDGE WHEN THE FORMER JUDGE HAS FILED NO FINDINGS OF FACT OR CONCLUSIONS OF LAW IS A VIOLATION OF THE REQUIREMENTS OF RULE 63 AND FUNDAMENTAL DUE PROCESS OF LAW.

II. WHETHER OR NOT THE IMPOSITION OF A CONSTRUCTIVE TRUST ON AN ESTATE BY THE ENTIRETIES FOR PAYMENT OF THE DEBT OF ONE SPOUSE WITHOUT JOINDER IN THE ACTION OF THE OTHER SPOUSE IS A VIOLATION OF DUE PROCESS OF LAW.

PARTIES TO PROCEEDING IN LOWER COURT

Jay Nell Locke

C. John Coniglio

Mesa Petroleum Company

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OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the court of appeals is reported at Locke v. Mesa Petroleum Company, 787 F.2d 1484 (11th Cir. 1986). The opinion of the district court is not reported.

JURISDICTIONAL STATEMENT

The opinion of the Eleventh Circuit was entered on April 28, 1986. Petitioner sought rehearing in the lower court and petition for rehearing was denied on June 30, 1986.

This court has jurisdiction pursuant to 28 U.S.C. Section 1254.

APPLICABLE PROVISIONS OF LAW

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, excepting cases arising in the land or naval forces, or in the militia, when an actual

service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall any person be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Const. Amend. V.

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for

findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). Fed. R. Civ. P. 52(a).

If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial. Fed. R. Civ. P. 63.

STATEMENT OF THE CASE

I

STATEMENT OF THE PROCEEDINGS BELOW

This is a petition for review of an affirmance by the United States Court of Appeals for the Eleventh Circuit of a final summary judgment of the United States District Court for the Middle District of Florida.

Mesa Petroleum Company ("Mesa") commenced this action, Case No. 82-85-CIV-OC, on April 16, 1982, against Jay Nell Locke and C. John Coniglio, Trustee ("Coniglio"), by filing a complaint for injunctive and declaratory relief concerning real property held by the Lockes as tenants by the entirety. Mesa sought injunction of a state court action filed by Mrs. Locke in which she sought to protect her entirety rights in the subject property.

Mesa sought consolidation of Case No. 82-85-CIV-OC and Case No. 75-28-CIV-OC which involved an action brought by Mesa against C. A. Locke, Jay Nell Locke's husband, and Coniglio for debts incurred during a joint venture between Mesa and Diamond T, a corporation of which Mr. Locke and Coniglio were stockholders. See Mesa Petroleum Company v. Coniglio, 629 F.2d 1022 (5th Cir. 1980). A judgment had been entered against Mr. Locke in which the court found that Mesa was entitled to possession of the subject real property.

At pretrial conference on December 1, 1982, Mrs. Locke and Mesa each filed a memorandum on preclusion. Mrs. Locke argued that because she was not a party to Mesa's original action against Mr. Locke and Coniglio, she was not precluded from pursuing her cause of action based

upon her entirety rights; Mesa argued that she was precluded by the doctrine of virtual representation.

On December 6, 1982, the court announced its ruling which precluded Mrs. Locke from pursuing her cause of action in protection of her entirety rights.

Immediately after the court's announcement, Mrs. Locke moved the court under Federal Rule of Civil Procedure 60(b)(4) and (6) to set aside the former judgments, orders and proceedings in Case No. 75-28-CIV-OC on which its findings of preclusion were based, and the court's ruling in Case No. 82-85-CIV-OC that she was precluded from further litigation.

In support of that motion, the following documents were received in evidence: an abstract of title to the properties involved; an October 28, 1978, agreement for deed; and the deposition of

Mrs. Locke. Also proffered for the court's consideration during the hearing were a disbursement schedule dated October 28, 1974, and the testimony of Mr. and Mrs. Locke and Coniglio.

During the hearing on the Rule 60(b) motion held December 6 and 7, 1982, many aspects of the underlying transaction and proceeding were presented to the court for the first time.

Judge Scott, who was presiding, took Mrs. Locke's Rule 60(b) motion under advisement. Toward the end of the proceedings on December 7, 1982, Judge Scott stated:

> I think I've got a better understanding of the case today than I've had since it was taken up on appeal, since I entered that order of 1978 that was appealed.

Concluding, he stated:

> So I'll have the last word. It looks like I've got some work to do to start out 1983. And

> hopefully I'll come up with the right decision at some appropriate time.

The motion was pending at Judge Scott's death.

On June 1, 1983, the case was reassigned to Judge Moore because of the death of Judge Scott.

In July of 1983, Mesa moved for entry of judgment. That motion was contested by Mrs. Locke on the basis of the pending Rule 60(b) motion.

On March 12, 1985, the District Court rendered a final summary judgment granting Mesa permanent injunction, costs and attorney's fees; prohibiting Mrs. Locke and Coniglio from proceeding any further with the state court litigation; and denying Mrs. Locke's Rule 60(b) motion.

Mrs. Locke appealed to the United States Court of Appeals for the Eleventh

Circuit from entry of judgment by the lower court against her and the lower court's award of attorney's fees. Oral arguments were heard and, on April 28, 1986, the Eleventh Circuit affirmed the lower court's order. Mrs. Locke petitioned for rehearing and her petition was denied by the Eleventh Circuit on June 30, 1986.

II

STATEMENT OF THE FACTS

From November, 1966, through December, 1970, the Coniglios and the Lockes acquired title to certain properties, referred to as tracts 1, 2, 3 and 4, in Sumter County, Florida.

Tract 1 consists of 330 acres. 310 acres of tract 1 were acquired jointly by the Coniglios and Lockes and the remaining 20 acres were acquired by the Coniglios in December, 1970. Tracts 2, 3

and 4 were also acquired jointly by the Coniglios and the Lockes.

Diamond T, a corporation of which Coniglio and Mr. Locke were stockholders, entered into a joint venture agreement with Mesa on June 6, 1972. Approximately two years later, Coniglio assured the personal guarantees of himself and Mr. Locke for certain indebtedness of Diamond T to the joint venture. On August 6, 1974, Mesa advanced funds to the joint venture. The promissory notes were executed, but were not secured by any interest in land.

On or about September 12, 1974, the Lockes executed a warranty deed ostensibly conveying all of their right, title and interest in and to tracts 1, 2, 3 and 4 to the Coniglios. That conveyance was for the purpose of obtaining financing at the Federal Land

Bank. The Coniglios then executed a mortgage on tracts 1, 2, 3 and 4 to the Federal Land Bank. The conveyance and mortgage were part of an overall refinancing and division of property between the Lockes and the Coniglios.

Coincidentally, the promissory notes signed by Coniglio and Mr. Locke were executed and mailed to Mesa.

On October 28, 1974: (1) the "deed" from the Lockes to the Coniglios was recorded in the public records of Sumter County, (2) the mortgage from the Coniglios to the Federal Land Bank was recorded in the public records of Sumter County, and (3) the Coniglios and the Lockes executed an agreement for deed relating to tract 1 under which the Lockes agreed to pay the Coniglios $217,678.00.

That sum is 43.5356 percent of $500,000.00, the amount borrowed from the Federal Land Bank. The percentage represents the ratio of acreage in tract 1 to the total acreage in all tracts.

The Lockes made every payment required under the agreement for deed from October 28, 1974, until the lower court entered the final judgment against Mrs. Locke. Since October 28, 1974, there has been no sharing of revenues derived from tracts 1, 2, 3 and 4 between the Lockes and the Coniglios.

In 1975, Mesa filed suit against Mr. Locke and Coniglio. Mrs. Locke was never joined as a party in that suit. During the course of that case, Mrs. Locke never conferred with her husband's counsel, was never deposed, never testified and never attended trial.

On October 13, 1978, Mesa obtained a judgment in which Coniglio was named Trustee of property held in trust for Mesa. The court held that the tract 1 estate should be included in the trust property because of the September 12, 1974, conveyance.

On January 26, 1982, Judge Scott ordered the property sold in satisfaction of the judgment. Mrs. Locke filed suit in state court against Coniglio in order to determine her right to tract 1.

Jurisdiction in federal court was based upon diversity of citizenship under 28 U.S.C. § 1332.

ARGUMENT FOR ALLOWANCE OF WRIT

I

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEAL ON THE DISCRETION OF A SUCCESSOR JUDGE TO ENTER JUDGMENT UNDER FED. R. CIV. P. 63.

Review should be granted by this court pursuant to Supreme Court Rule 17.1(a) because the decision of the Eleventh Circuit is in conflict with decisions of the Fourth,[1] Sixth[2] and District of Columbia[3] circuits.

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[1] See Whalen v. Ford Motor Credit Company, 684 F.2d 272 (4th Cir. 1982), cert. denied 459 U.S. 910 (1982).

[2] See Arrow-Hart, Inc. v. Philip Carey Company, 552 F.2d 711 (6th Cir. 1977).

[3] See Brennan v. Grisso, 198 F.2d 532 (DC Cir. 1952).

The Fourth Circuit has construed Rule 63 as a positive prohibition on substitution of a judge prior to verdict where all parties have not stipulated their consent. Whalen v. Ford Motor Credit Company, supra. In Whalen, the court stated that Rule 63 "expressly deals only with substitution of a judge" after return of a verdict in a jury trial or after findings of fact and conclusions of law are filed. 684 F.2d at 274.

The discretion of a substitute judge to enter judgment on the basis of testimony taken by the former judge has been considered by the Advisory Committee on Federal Rules of Civil Procedure. 684 F.2d at 275-277, citing Reporters Draft of Several Amendments, Federal Rules of Civil Procedure, at page 9 (May 11, 1953) (Charles E. Clark Papers, Yale University Library). The committee explored a

suggestion that the rule should not require a substitute judge to start a trial over again after the death of a judge. 684 F.2d at 275-277. The committee considered whether or not a successor judge should be able to receive in evidence a transcript of the former proceedings. Id. The committee decided to leave the rule unchanged. Id. Charles E. Clark, reporter for the committee, expressed the decision of the committee that "death of the judge before verdict or filing of findings and conclusions necessitated a new trial absent a stipulation by the parties." 684 F.2d at 277.

Findings of facts and conclusions of law in a non-jury trial are governed by Federal Rule of Civil Procedure 52 which provides, in part:

> It will be sufficient if the findings of fact and

> conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court.

(Emphasis added).

If the requirements of Rule 52 are not satisfied by a former judge, a successor judge may not enter judgment without the unanimous agreement of the parties. Arrow-Hart, Inc. v. Philip Carey Company, supra. Arrow-Hart involved a non-jury trial in which the original trial judge died after hearing all of the evidence, but before making findings of fact and conclusions of law. Id. Although convinced he could render a decision based upon the transcript, the successor judge stated that he had no discretion to do so because of the requirements of Rule 63. 552 F.2d at 712.

Brennan v. Grisso, supra, is strikingly similar to the situation in the instant case. There, after a non-jury trial, the plaintiff filed a motion to permit introduction of further evidence. 198 F.2d at 532. Before taking any action on the motion, the judge died. Id. The court held that a new trial should be granted because it was unable to determine how the deceased judge would have ruled in light of the additional evidence that had been offered. Id.

Here, Judge Scott heard new evidence during the hearing after which he made no findings of fact or conclusions of law. The hearing represents the only time that Mrs. Locke has had the opportunity to present her claim for relief to the court. The determination of Mrs. Locke's 60(b) motion was dependent upon Judge

Scott's understanding of the new evidence presented during the hearing.

As in Brennan v. Grisso, supra, there is no way of determining whether Judge Scott would have granted or denied Mrs. Locke's motion. Judge Scott's comments at the close of evidence demonstrate that he considered the evidence relevant. The positive prohibition of Rule 63 should have prevented entry of judgment without stipulation by all of the parties. See Whalen v. Ford Motor Credit Company, supra. Under the circumstances of this case, the successor judge had no discretion to enter judgment and should have granted a new trial. See Arrow-Hart, Inc. v. Philip Carey Company, supra.

Mrs. Locke has a right to have her claim for relief determined by a judge

who has heard the testimony and is in a position to determine the significance, credibility, and weight of the evidence. The lower court's failure to allow Mrs. Locke to present her claim for relief to a court of competent jurisdiction is a denial of due process of law as guaranteed by the Fifth Amendment to the United States Constitution.

II

THE LOWER COURT'S USE OF THE DOCTRINE OF VIRTUAL REPRESENTATION IS INAPPROPRIATE IN RELATION TO TENANCY BY THE ENTIRETY PROPERTY.

Mrs. Locke's petition for review on writ of certiorari should be granted by this court pursuant to Supreme Court Rule 17.1(a) because the lower court's application of the doctrine of virtual representation is in conflict with

decisions of the Supreme Court of Florida.[4]

The Florida Supreme Court has long held that an estate by the entirety is vested in the husband and wife as one person, and neither spouse can sell, forfeit or encumber any part of the estate without the consent of the other, nor can one spouse alone lease it or contract for its disposition without such consent. Richart v. Roper, supra; Cooper v. Maynard, supra.

In application of the Florida Supreme Court's interpretation of the nature of the entirety estate, Florida courts have held that where tenancy by the entirety property is involved, both

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[4] See Richart v. Roper, 25 So.2d 80 (Fla. 1946); Cooper v. Maynard, 23 So.2d (Fla. 1945).

spouses are indispensable parties to an action and failure to join both spouses renders a complaint defective. See Smith v. Hindery, 454 So.2d 663 (Fla. 1st DCA 1984); A.M. Moore v. Leisure Pool Service, Inc., 412 So.2d 392 (Fla. 5th DCA 1982); Murray v. Sullivan, 376 So.2d 886 (Fla. 1st DCA 1979); Marson v. Comisky, 341 So.2d 1040 (Fla. 4th DCA 1977).

Under Florida law, the Lockes' entireties estate could not be forfeited or encumbered on the basis of Mr. Locke's debt to Mesa. See Smith v. Hindery, supra; Murray v. Sullivan, supra. Mrs. Locke was never a party to Mesa's action against Mr. Locke, and even if she were a party, the court should not have forfeited the entireties estate since she was not involved in the business dealing or a signatory on the promissory note

upon which Mesa based its claim for relief. Id.

The lower court based its imposition of the constructive trust upon the September 24, 1974, property transfer. Locke v. Mesa Petroleum Company, 787 F.2d 1484 (11th Cir. 1986). The court held that Mrs. Locke's interest in the entirety estate did not arise until October of that year so that the constructive trust was appropriate. Id.

However, the lower courts' rulings ignore the effect of Section 697.01, Florida Statutes, which provides:

> (1) All conveyances, obligations conditioned or defeasible, bills of sale or other instruments of writing conveying or selling property, either real or personal, for the purpose of with the intention of securing the payment of money, whether such instrument be from the debtor to the creditor or from the debtor to some third person in trust for

> the creditor, shall be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages.

In Cain & Bultman, Inc. v. Miss Sam, Inc., 409 So.2d 114 (Fla. 5th DCA 1982), the court held that where legal title is transferred to a creditor who enters into an agreement for deed with the debtor as purchaser for the purpose of securing a loan, the deed and the agreement for deed together constitute a "mortgage" under Section 697.01, Florida Statutes. 409 So.2d at 115.

Here, the deed executed by the Lockes in October, 1974, created a mortgage in favor of the Coniglios with respect to tract 1 and conveyed the Lockes' interest in tracts 2, 3 and 4. See Cain & Bultman, Inc. v. Miss Sam,

Inc., supra. The totality of this situation demonstrates a financing arrangement with respect to tract 1 and a partition with respect to all of the other properties. Id. Through this agreement, the Lockes retained their prior interest and acquired that of the Coniglios in tract 1, and the Coniglios retained their prior interest and acquired that of the Lockes in tracts 2, 3 and 4. Since the Lockes' property was held by the entireties, under Florida law, Mrs. Locke was a necessary party to any action which affected that property. Richart v. Roper, supra; Cooper v. Maynard, supra.

Under Florida law, in order to overcome the presumption that a joint conveyance is required regarding an estate by the entireties, clear and convincing evidence is necessary to prove

that one spouse acts as the other spouse's agent. Douglass v. Jones, 422 So.2d 352 (Fla. 5th DCA 1982). Furthermore, the Douglass exception applies only if the separate transfer does not adversely affect the interest of the spouse for whom the other spouse is claimed to have acted as agent, and only if the transfer occurs with the assent of the non-acting spouse. 422 So.2d at 354.

The lower court relied upon the doctrine of virtual representation as a basis for preclusion. Under that doctrine, a spouse may be precluded from litigating issues which have been raised in a prior court proceeding to which the other spouse was named as a party. See Cotton v. Federal Land Bank of Columbia, 676 F.2d 1368 (11th Cir. 1982); Cleckner v. Republic Van and Storage Company, 556 F.2d 756 (5th Cir. 1977); Kline v.

Heyman, 309 So.2d 242 (Fla. 2d DCA 1975). Application of the doctrine requires more than the mere knowledge of one spouse that the other may be litigating a claim in which both spouses may have an interest. Id.

None of the cases cited by Mesa or the lower court involved a taking of tenancy by the entirety property without joinder of both spouses. Id. Florida law indicates that the presence of both spouses is always necessary in matters relating to entirety property. See Ellis Sarasota Bank and Trust Company v. Nevins, 409 So.2d 178 (Fla. 2d DCA 1980). Furthermore, in all of the cases cited by the lower court and Mesa, both spouses were involved in the situation that led to the litigation and, in Kline, there was express ratification by the non-litigating spouse.

The instant case is distinguishable from all of the cited cases involving virtual representation. Contrary to the situation in Kline, there was no express ratification. Unlike the spouses in Cleckner and Cotton, Mrs. Locke was not involved in any of the business dealings with Mesa.

Virtual representation might preclude a spouse from relitigating claims previously brought by the other spouse in cases involving property other than entireties property. However, the lower courts should have required joinder of Mrs. Locke in order to affect the entireties property. See Marson v. Comisky, supra; A.M. Moore v. Leisure Pool Service, Inc., supra. Without clear and convincing evidence that Mrs. Locke knowingly chose that Mr. Locke act as her agent in the separate action and

consented to her husband's defense in that action, Mrs. Locke's entireties interest can not be subject to Mesa's claim against Mr. Locke. See Douglass v. Jones, supra. Even with such consent, it is questionable that the exception to the requirement of joinder of the parties is applicable here because its application would adversely affect Mrs. Locke's interest. Id.

Mrs. Locke should not be precluded from pursuing her claim for relief. See, e.g. National Equipment Rental Limited v. Szukhent, 375 U.S. 314 (1964). She was not represented in Case No. 75-28 and yet that decision has profoundly affected her property rights. Since Mrs. Locke was neither party nor privy in that case, the lower court lacked jurisdiction to so affect her rights. See e.g., Hansberry v. Lee, 311 U.S. 32 (1940). Mrs. Locke

has been denied the opportunity to fully litigate her cause of action in violation of her right to due process of law as guaranteed by the Fifth Amendment.

CERTIFICATE OF SERVICE

I certify that copy hereof has been furnished to Stephen A. Hould, Hould, Donnelly & Wrestling, 220 East Forsyth Street, Jacksonville, Florida 32202, and Steven H. Gray, 125 Northeast First Avenue, Suite 1, Ocala, Florida 32670, by mail this 13th day of October, 1986.

/s/

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APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

MESA PETROLEUM
COMPANY,

Plaintiff,

vs. CASE NO. 75-28-Civ-Oc-16

C. JOHN CONIGLIO,
et al.,

Defendants.
_____/

MESA PETROLEUM
COMPANY,

Plaintiff,

vs. CASE NO. 82-85-Civ-Oc-16

JAY NELL LOCKE and
C. JOHN CONIGLIO,
Trustee,

Defendants.
_____/

ORDER AND SUMMARY FINAL JUDGMENT

This matter is before the Court upon motion of the plaintiff, Mesa Petroleum Company ('Mesa'), filed herein on July 11, 1983, for entry of judgment against the defendant Jay Nell Locke ('J. N. Locke') and C. John Coniglio

('Coniglio'). Mesa seeks a permanent injunction, along with costs and attorney's fees, against J. N. Locke and Coniglio, prohibiting them from proceeding any further with certain state court litigation. The Court, the Honorable Charles R. Scott, granted Mesa's application for a preliminary injunction in an order dated May 6, 1982. Mesa also seeks a declaration that its rights and interests in certain real property located in Sumter County, Florida, which the parties and the Court have generally referred to as "Tract 1", are superior to the rights and interests, if any, of J. N. Locke. For the reasons discussed below, the Court concludes that the plaintiff is entitled to the equitable relief it seeks and shall enter judgment accordingly.

1. PRIOR PROCEEDINGS

This case was originally assigned to the Honorable Charles R. Scott, but due to Judge Scott's death on May 12, 1983, has been transferred to the undersigned. On December 6 and 7, 1982, Judge Scott presided over a hearing or "trial" in this matter. At the outset of those proceedings, Judge Scott orally delivered a short opinion expressing his inclination to hold that the defendant J. N. Locke was barred or precluded from litigating in Case No. 82-85-Civ-OC the issues previously raised and lost by her husband, Coy Aldridge Locke ('C. A. Locke'), in Case No. 75-28-Civ-Oc. The test of that opinion was as follows:

> The position of defendant J. N. Locke in this case, 82-85-Civ-Oc, is summarized in her pretrial memorandum in the following issue:

> "Can the Court impress a lien or establish a constructive trust on or over property held as an estate by the entireties on account of the debt of one spouse?"

Defendant J. N. Locke contends that the Court has done this is [sic] a previous lawsuit to which her husband was a party defendant, 75-28-Civ-Oc, now consolidated with the present case.

The entireties interest asserted by J. N. Locke arises from an "Articles of Agreement" dated October 28, 1974. This identical interest and, in fact, the identical issue were raised and fully litigated in the previous lawsuit by C. A. Locke. The Court's imposition of a constructive trust was affirmed by the Fifth Circuit in Mesa Petroleum Co. v. Coniglio, 629 F.2d 1022 (5th Cir. 1980). Furthermore, this Court has specifically determined that the interest of Mesa in the res of the constructive trust is superior to any entireties interest of the Lockes in Tract 1, so that the issue as framed by J. N. Locke is entirely beside the point. In other words, the Court has not impressed a constructive trust on property held as an estate by the entireties.

The Court has expressly considered the relevant question of who holds the superior interest in Tract 1, and has decided in favor of Mesa. In an Order of January 25, 1982, on page 9, [Mesa Petroleum Co. v. Coniglio, 16 B.R. 1015, 1020 (M.D. Fla. 1982).] the Court said:

> With respect to the instant matter. . . the Court finds that Mesa's beneficial interest in Tract No. 1 is superior to the claim of Locke and his wife. The reconveyance of Tract No. 1 from Coniglio and his wife back to Locke and his wife, occurring as it did several years prior to the Court's order of December 26, 1978 [which created the constructive trust], was necessarily considered and discounted by the Court's inclusion of Tract No. 1 within the property subject to the constructive trust. Ordinarily, an agreement for deed operates under Florida law to convey equitable title to the purchaser while legal title remains in the vendor. See Miami Bond & Mortgage Co. v. Bell, 133 So. 547 (Fla. 1931). In the instant case, however, the Court, in

creating the constructive trust, held that the equitable interest in the four tracts of land was held by Mesa. Consequently, it properly directed Coniglio, as record title holder, to act as trustee and to hold all four tracts for the benefit of Mesa.

The Court, in an order to be formally issued later . . . will hold that defendant J. N. Locke is now precluded from raising the above-quoted issue from her memorandum . . . or any issue as to whether her interest in the constructive trust property is superior to that of the plaintiff Mesa Petroleum Company, on the following grounds:

1. The reasons generally supporting the rule that spouses with concurrent property interests are not in privity for purposes of preclusion are not present in this case. The positions of C. A. Locke and J. N. Locke are identical and there is no reason to suppose that one cannot adequately represent the other.

2. Upon considering the totality of circumstances, the Court finds that there was an implied agreement of J.

> N. Locke to be represented by, or to have her interest represented by, C. A. Locke in the previous litigation, or to be bound by the results thereof.
> 3. Under the totality of circumstances, the plaintiff Mesa had a justified expectation that defendant J. N. Locke would not pursue this matter in the state court action or in the present litigation. The plaintiff Mesa has been substantially prejudiced by J. N. Locke's delay in litigating this matter, which delay by J. N. Locke was unjustifiable in view of her admission that she was aware of this litigation from its outset in 1975, and the fact that she was at no time prevented from or hindered from personal participation therein.

(Transcript, pages 3-6).

Counsel for J. N. Locke thereupon moved the Court for relief from the order of preclusion, pursuant to Rule 60(b)(4), Federal Rules of Civil Procedure, on the

grounds that the judgment in Case No. 75-28-Civ-Oc is void, and void as to J. N. Locke; and Rule 60(b)(6), Federal Rules of Civil Procedure, on the equitable ground that any representation which might be imputed to J. N. Locke in Case No. 75-28-Civ-Oc was ineffectual and thus should not preclude her from asserting her rights in the instant litigation.

The Court then allowed the parties to proffer the testimony and depositions of various witnesses, along with certain documentary evidence. In addition, the Court heard extensive arguments from counsel on the legal questions involved. Because Judge Scott died without having entered a formal order on the question of preclusion and without having ruled upon defendant J. N. Locke's Rule 60 motions, the Court necessarily must address these

matters in considering plaintiff's motion for judgment.

2. NEW HEARING UNNECESSARY

The Court initially must decide whether it may rule upon plaintiff's motion for judgment based solely on the existing record. Defendants contend that Judge Scott's death renders this Court powerless to rule on plaintiff's motion without first conducting a new evidentiary hearing.

It is evident that, but for J. N. Locke's subsequent Rule 60(b) motions, Judge Scott's bench ruling quoted above would set forth a sufficient factual and legal basis for holding that J. N. Locke is precluded from relitigating the issues lost by her husband in the previous lawsuit. Such a holding, being dispositive, would enable the Court to enter judgment in this action for the

plaintiff. See Fed.R.Civ.P. 63, 52(b); Makah Indian Tribe v. Moore, 93 F. Supp. 105 (W.D. Wash. 1950), rev'd on other grounds 192 F.2d 224 (9th Cir. 1951); The Del-Mar-Va, 56 F. Supp. 743 (E.D. Va. 1944). The defendants' contention that a new hearing is required, therefore, would have merit only if the arguments raised or the evidence adduced in support of defendant's Rule 60(b) motions at the subsequent hearing were not merely duplicative of what was already before the Court and demonstrated the existence of a genuine factual issue on grounds which might form the basis for relief from a judgment. See Bromberg v. Moul, 275 F.2d 574, 576 (2d Cir. 1960) (transcript of proceedings before deceased judge may be treated as "supporting affidavits" on motion for summary judgment). As is set out below,

the Court finds that neither condition was satisfied. In any case, numerous comments made by Judge Scott during oral arguments following completion of the evidentiary proffer on December 7, 1982 plainly reveal that his opinion had not changed (E.g., Transcript, proceedings of December 7, 1982, p. 50, L. 14 et seq.; p. 53, L. 15 et seq.; p. 62, L. 18-19; p. 66, L. 12 et seq.; p. 77, L. 10 et seq.). Accordingly, the Court concludes that a new hearing is unnecessary.

3. PROCEEDINGS IN CASE NO. 75-28-CIV-OC

The defenses J. N. Locke seeks to raise in this suit (Case NO. 82-85-Civ-Oc-16) and the grounds presented for her Rule 60(b)(4) motion clearly were at issue, and in fact were vigorously litigated, in the previous lawsuit to which J. N. Locke's husband, C. A. Locke, was a party defendant, Case

No. 75-28-Civ-Oc. In that case, this Court (Judge Scott) found that the Lockes, by recorded deed executed on September 12, 1974, had conveyed their undivided one-half interest in Tract 1, and in three other tracts of real property, to the defendant C. John Coniglio and his wife for the specific purpose of defrauding and hindering the plaintiff, Mesa Petroleum Company, from collecting on a promissory note which C. A. Locke executed to Mesa just four days thereafter. (Judgment and opinion of October 13, 1978). The judgment against C. A. Locke awarded Mesa an amount of $159,290.67 plus costs and interest from the date of judgment, and stated that the Court would set aside the September 12, 1974 conveyance and impress a lien on behalf of Mesa. In an order of December 26, 1978, the court awarded Mesa $50,000

for attorneys' fees; and, having abandoned the idea of setting aside the fraudulent conveyance, the Court ordered defendant Coniglio to hold in a constructive trust for the benefit of Mesa that interest in the four tracts which the Lockes conveyed to Coniglio and his wife by the September 12, 1974 deed. The order provided that the trust would be subordinate only to the security interest of the Federal Land Bank of Columbia, South Carolina, and could be extinguished only upon satisfaction of the entire judgment debt owed by C. A. Locke to Mesa.[1] The Court's findings,

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[1] The Court awarded a similar money judgment in favor of Mesa against defendant Coniglio, which has been settled. (Release, filed February 20, 1981).

Prior to the Court's orders of October 13, 1978 and December 26, 1978, (Footnote Continued)

awards, and creation of the constructive trust were affirmed by the Fifth Circuit Court of Appeals in Mesa Petroleum Company v. Coniglio, 629 F.2d 1022 (5th Cir. 1980).

In the instant suit, C. A. Locke's wife, J. N. Locke, collaterally challenges the Court's ruling in 75-28-Civ-Oc by asserting that the Court imposed a lien upon, and established a constructive trust over, property held as an estate by the entireties on account of the debt of one spouse. The ownership interest in Tract 1 which J. N. Locke asserts as a tenant by the entirety arises from an "Articles of Agreement",

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(Footnote Continued)
the marriage of defendant Coniglio and his wife was dissolved, and Mrs. Coniglio conveyed all of her right, title and interest in the four tracts to Mr. Coniglio.

dated October 28, 1974 (shortly after the Lockes' September 12, 1974 conveyance of their interest in the four tracts to the Coniglios) which ostensibly reconveyed Tract 1 to Locke and his wife. This Articles of Agreement was an agreement for deed whereby Coniglio and his wife would apparently retain title to Tract 1 until they received from Locke and his wife the sum of $217,670, payable in annual installments of $19,239. The Articles of Agreement apparently has never been recorded.

J. N. Locke asserts that this October 28, 1974 agreement for deed was not raised by her husband in the previous suit, and thus was not considered by the Court in its finding that the September 12, 1974 transaction was fraudulent and in its imposition of the constructive trust. Even if this were the case, it

would be irrelevant because the matters were at issue and any defense available to J. N. Locke as a result of the October 28, 1974 transaction was also available to her husband C. A. Locke in the previous lawsuit. "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Olmstead v. Amoco Oil Company, 725 F.2d 627, 631-32 (11th Cir. 1984) (quoting with emphasis Federated Department Stores v. Moitie, 452 U.S. 394, 398 (1981)). Hence, the relevant inquiry is not whether C. A. Locke actually raised those matters in the prior suit, but only whether the results of that suit are now binding upon J. N. Locke.

However, the record of 75-28-Civ-Oc reveals that the identical defenses which

J. N. Locke now urges were in fact raised by C. A. Locke (See Defendants' "Objection to Proposed Findings of Fact and Conclusions of Law", filed January 16, 1978, at paragraph 14) and rejected by this Court and by the Court of Appeals. As the Fifth Circuit stated,

> Coniglio and Locke maintain that the district court erred in finding that the conveyances they and their wives transacted shortly before and after the execution of the promissory notes were fraudulent. The Court's determination that these conveyances were made without valid consideration and with the intent to defraud Mesa is not clearly erroneous and, indeed, seems virtually unassailable.

629 F.2d at 1029 (emphasis added).

Moreover, on August 31, 1979, C. A. Locke filed a voluntary petition of Bankruptcy (In re: Coy Aldridge Locke, Jr., d/b/a C & L Farms, Case No. 79-541-Bk-J) which ultimately resulted in Mesa being awarded $1,056.08 as a general

unsecured creditor (Bankruptcy Court, Order of May 7, 1980) and in C. A. Locke being granted a personal discharge in bankruptcy (Bankruptcy Court, Order of July 11, 1980). This Court, in Case No. 75-28-Civ-Oc, was called upon to determine whether the outcome of those bankruptcy proceedings affected Mesa's entitlement to a forced sale of the land forming the res of the constructive trust created in the Court's order of December 26, 1978. In an order dated January 25, 1982, the Court held that Mr. Locke's personal discharge in bankruptcy did not affect Mesa's interest in the trust property; consequently, the Court ordered defendant Coniglio, as constructive trustee, to conduct a sale of the trust property. Mesa Petroleum Co. v. Coniglio, 16 B.R. 1015 (M.D. Fla. 1982). That order set forth a very detailed and

considered review of the facts of the bankruptcy case in connection with the Lockes' claim to an entireties interest in Tract 1 arising from the October 28, 1974 agreement for deed. While acknowledging that Tract 1 was excluded from Mr. Locke's bankruptcy estate because the Lockes' alleged interest in that property, flowing from the October 28, 1974 transaction, was as co-tenants by the entirety, the Court nevertheless emphasized that since Mesa's beneficial interest in Tract 1 arose out of the September 12, 1974 transaction, any entireties interest in Tract 1 which the Lockes may have acquired from the Congilios [sic] by the October 28, 1974 agreement for deed exists subject to the constructive trust in favor of Mesa. 16 B.R. at 1020.

The foregoing discussion makes clear that the defenses J. N. Locke now seeks to espouse were equally applicable and available to her husband in the previous suit, were placed into issue by that suit, and were considered and rejected by this Court in that suit. Never during the pendency of that litigation did J. N. Locke seek to intervene to protect her interest. The instant litigation arose because subsequent to this Court's order of January 25, 1982 directing sale, J. N. Locke filed a collateral suit in the Sumter County Circuit Court (No. 82-125-CA) naming only Coniglio as defendant, seeking to enjoin Coniglio from carrying out the sale of Tract 1 pursuant to this Court's Order. Mesa thereupon filed this suit against J. N. Locke and Coniglio seeking to enjoin the state court proceedings in order to

protect and effectuate this Court's judgment in Case No. 75-28-Civ-Oc. See Order granting preliminary injunction, filed herein on May 6, 1982.

4. JUDGMENT IN CASE NO. 82-85-CIV-OC-16

Concerning whether J. N. Locke may properly oppose Mesa based on issues which were resolved against C. A. Locke in the earlier action, two doctrines have come to the Court's attention and have been argued by the parties. The first is the doctrine of "preclusion", under which a person who was not a named party to a previous lawsuit may nevertheless, in certain circumstances, be bound by the results of that suit. The second is the equitable doctrine of laches. Judge Scott's oral opinion quoted above, holding that Mrs. Locke is now barred from raising her defenses, sets forth

grounds in which the two doctrines interplay.

a. Doctrine of Preclusion

Because of its functional descriptiveness, the term "preclusion" has become increasingly used to refer to the doctrines traditionally labeled res judicata and collateral estoppel. Preclusion occurs when an adjudication of a claim or issue is held to be binding on a person, so as to preclude him or her from relitigating that claim or issue in a subsequent action. See generally, 18 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §4402 (1981); Migra v. Warren City School District Board of Education, ____ U.S. ____, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); Hann v. Carson, 462 F.Supp. 854 (M.D. Fla. 1978).

Although the relative property interests of the parties are, of course, governed by Florida law, because the former adjudication involved herein was a federal diversity action, federal law governs the applicable preclusion principles. Aerojet-General Corp. v. Askew, 511 F.2d 710, 715-18 (5th Cir.) cert. denied 423 U.S. 908 (1975); Cleckner v. Republic Van & Storage Co., Inc., 556 F.2d 766, 769 n. 4 (5th Cir. 1977); Stovall v. Price Waterhouse Co., 652 F.2d 537, 540-41 (5th Cir. 1981). In any case, the pertinent Florida and federal law are essentially the same. See Aerojet-General Corp. v. Askew, 511 F.2d at 719 n. 10.

It has generally been held that the binding and preclusive effects of a final judgment extend both to the parties involved and to persons in privity with

those parties. Southwest Airlines Co. v. Texas International Airlines, Inc., 546 F.2d 84, 94-95 (5th Cir.), cert. denied 434 U.S. 832 (1977); Kline v. Heyman, 309 So.2d 242 (Fla. 2d DCA 1975); See Federated Department Stores v. Moitie, 452 U.S. 394, 398 (1981). Mrs. Locke was not a party to the previous lawsuit, so the Court must determine whether she had a relation of privity with her husband. In addressing questions of privity, however, current decisions generally look directly to the reasons for holding a person bound by a judgment. Privity is thus viewed as a convenient means of expressing conclusions that are supported by independent analysis. Southwest Airlines, supra at 95; Wright, Miller & Cooper, supra at §4448.

In this case the privity question arises in the context of a husband and

wife having concurrent property interests, i.e., a tenancy by the entireties apparently created by the October 28, 1974 agreement for deed. Defendant J. N. Locke contends that she cannot be bound by the previous adjudication against her husband due to a long line of Florida cases which hold that a plaintiff must join both tenants in a proceeding before entireties property can be made available to answer for the individual debts of one of the tenants. E.g., Ellis Sarasota Bank & Trust Co. v. Nevins, 409 So.2d 178 (Fla. 2d DCA 1982); Meyer v. Faust, 83 So.2d 847 (Fla. 1955); Lindsley v. Phare, 155 So. 812 (1934). However, as the plaintiff points out, such cases have uniformly involved situations in which the plaintiff sought to set aside or execute upon an entireties interest

without joining both spouses. In case 75-28-Civ-Oc, by contrast, the Court did not set aside the agreement for deed under which the Lockes claim an interest in Tract 1; rather, the Court created a constructive trust for the benefit of Mesa arising out of the prior transaction of September 12, 1974. By allowing Mesa to liquidate that trust, the Court has in no way infringed upon the Lockes' estate by the entireties in Tract 1, since the Lockes' estate by the entireties exists subject to the constructive trust for Mesa. Mrs. Locke, therefore, does not seek to protect her property interest against the claim of her husband's creditor, but instead seeks to expand the ownership rights of herself and her husband so as to include property presently owned by Mesa. Accordingly, because the Lockes' estate by the

entireties is not affected, the relief ordered by the Court in the earlier suit did not require joinder of Mrs. Locke. Indeed, if such a limitation were applicable, it would have applied equally to C. A. Locke in the previous suit. As noted above, the same contention was raised therein by C. A. Locke and was rejected by this court and the Court of Appeals.

With respect to the question of privity, nevertheless, the established general rule is that the mere existence of a concurrent property interest, even when incidental to a marital relationship, does not establish a relationship of privity. See 58 ALR 2d 701, 706 (1958); Restatement, Second: Judgments §54, and comment a; Wright, Miller & Cooper, supra at §4461. Exceptions to this general rule have

emerged, however, where additional factors appear. The annotation cited above states that a judgment against one spouse is binding upon the other spouse who was not a party to the litigation if the non-party spouse was represented by the party spouse as his or her agent, or has ratified the acts of the party spouse, or was virtually represented by the party spouse. That the non-party spouse had knowledge of the pending litigation, although not decisive, is a factor to be considered. 58 ALR 2d at 706-07; see Kline v. Heyman, 309 So.2d at 245.

The doctrine of "virtual representation" has been developed in several decisions of the Eleventh and former Fifth Circuits. In Aerojet-General Corp. v. Askew, supra, the Court said:

> Under the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative.

517 F.2d at 719.

Although the Aerojet-General case was procedurally quite similar to this case, the general import of the above-quoted holding was unclear because the virtual representation which the Court recognized was between two governmental entities. See Southwest Airlines Co. v. Texas International Airlines, Inc., 546 F.2d at 97.

In Pollard v. Cockrell, 578 F.2d 1002 (5th Cir. 1978), the Court considered the virtual representation doctrine in the context of successive actions brought by different private individuals each seeking to contest the constitutionality of a municipal

regulatory ordinance. Concluding that the relationship between the two sets of plaintiffs did not amount to the close alignment of interests necessary under the virtual representation doctrine, the Court ruled that

> Virtual representation demands the existence of an express or implied legal relationship in which parties to the first suit are accountable to non-parties who file a subsequent suit raising identical issues.

Id. at 1008. Accord Dills v. City of Marietta, Georgia, 674 F.2d 1377, 1379-80 (11th Cir. 1982). Compare Cauefield v. Fidelity & Casualty Co. of New York, 378 F.2d 876 (5th Cir. 1967) (applying Louisiana doctrine of "judicial estoppel" where plaintiffs, although not parties, had testified in prior state court action involving identical claim).

Most recently, in Cotton v. Federal Land Bank of Columbia, 676 F.2d 1368

(11th Cir. 1982), the doctrine of virtual representation was applied between a husband and wife so as to preclude the husband from litigating issues which were or should have been raised in a prior state court proceeding to which only the wife was a named party. The Court concluded that the facts supported the district court's finding that Mrs. Cotton was Mr. Cotton's virtual representative or alter ego in the state court proceedings. See also Cleckner v. Republic Van & Storage Co., Inc., 556 F.2d 766, 770-71 (5th Cir. 1977) (Florida law of res judicata applied to bar wife from pursuing claim not raised in previous state court action involving same transaction to which husband was sole defendant, where wife's conduct reasonably led opposing party to believe that husband represented the interests of

both parties); Kline v. Heyman, 309 So.2d 242, 245 (Fla. 2d DCA 1975) (wife bound by prior judgment against husband, where husband had wife's consent to represent her interest); Fleming v. Cooper, 284 S.W. 2d 857 (Ark. 1956) (same).

The various threads of the "virtual representation" decisions and other non-party preclusion cases have been thoughtfully assimilated and sorted out in the Restatement of Judgments, Second (1981). Section 54 of the Restatement pertains to co-owners of property. Although the general rule is that a judgment for or against one co-owner concerning his interest does not have res judicata effects on another co-owner, exceptions are recognized when certain "further relationships between the co-owners" have arisen. §54(1) and comment b. One such exception occurs

when a person has agreed to be bound by the determination of issues in an action between others. Pursuant to §40 of the Restatement, incorporated by reference into §54, the person is bound in accordance with the terms of his agreement. The comments to §40 explain that an agreement to be bound may be implied from conduct and manifestations of intention, as inferred from the totality of circumstances. In ascertaining whether such an agreement is to be inferred, relevant considerations are the closeness of the interests of the persons involved, whether they were represented by the same or collaborating counsel, whether opportunity existed for the person to participate as a party in the first action, whether the person asserted to have the agreement could invoke benefits of the judgment in the

other action should its outcome favor his position, and what representations were made to the court concerning the relation between the actions.

Another exception recognized in the Restatement, Second, occurs when a non-party's conduct reasonably induces reliance upon a prior adjudication. §62; see Comment b to §54. Under §62, a non-party is precluded from litigating a claim against a party to a prior suit if judgment on the claim would upset the repose established by the first judgment, the non-party's conduct reasonably led the part to believe that the non-party made no claim concerning the transaction or would govern his conduct by the judgment, and the party justifiably abstained from joining the non-party in the pending suit or in a separate suit. See Wright, Miller & Cooper, supra at

4453. The question of whether the party's reliance upon the prior judgment was reasonably induced by the non-party's conduct is to be assessed in light of the relationship among the parties, the extent to which there is identity of interest between the non-party and the party with whom the opposing party has previously litigated, the purpose and effect of the prior litigation, and the opportunity and duty the non-party had to clarify any ambiguity about his or her position. Comment b to §62. A claimant may be denied the opportunity to pursue an action if her delay in asserting the claim would work unjust hardship on a person who had already litigated related issues with another party. Comment a to §62; see also §74 (denial or limitation of relief for failure to exercise

reasonable diligence in discovering ground for relief or in seeking relief).

Consideration of the above two exceptions as applied to the circumstances of this litigation compels a finding that J. N. Locke is now precluded from challenging the judgment against her husband in Case No. 75-28-Civ-Oc. These exceptions correspond to the second and third grounds upon which Judge Scott so ruled at the December 6, 1982 hearing.

i. Implied Agreement

First, the totality of circumstances reveals that an implied agreement existed or arose between J. N. Locke and her husband under which she agreed to be represented or to have her interest represented by C. A. Locke in the previous litigation against Mesa, or to be bound by the results of that

litigation. Mrs. Locke testified that she has been aware of that suit since its inception in 1975, when Mr. Locke explained to her what the suit was about (J. N. Locke, deposition of May 17, 1982 [hereinafter "J.N.L. Depo."], p. 20, L. 21 et. seq.). She also was informed by her husband of all the major developments in that suit, including this Court's judgment against her husband in 1978, her husband's appeal of that judgment, the Fifth Circuit's affirmance of that judgment, and this Court's order of January 25, 1982 directing the sale of the trust property. (Transcript, evidentiary hearing of December 6, 1982 [hereinafter "Transcript"], p. 81, L. 19 et. seq.; J.N.L. Depo., p. 21, L. 5 et. seq.). Additionally, Mrs. Locke personally looked at copies of some of the papers which the parties filed in

that suit. (J.N.L. Depo., p. 17, L. 17 et. seq.). Nevertheless, during that entire period, Mrs. Locke made no attempt to intervene on her own behalf to protect her alleged property interest. Rather it was only after this Court had rejected her husband's final efforts to defeat the constructive trust (see C. A. Locke's "Statement of Facts and Memorandum of Law", filed December 24, 1981) and a judicial sale of the trust property was imminent, that Mrs. Locke filed her collateral suit in state court naming the constructive trustee, C. John Coniglio, as the sole defendant. J. N. Locke admitted to having discussed that suit with her husband prior to its filing on April 8, 1982 (J.N.L. Depo. p. 14, L. 12-13), and there were several indications in her testimony that the suit was initiated by the Lockes together

and very likely at the instance of Mr. Locke (e.g., J.N.L. Depo., p. 14, L. 14 et. seq.; p. 15, L. 16-18; p. 17, L. 6 et. seq.; p. 18, L. 5 et. seq.). These indications and circumstances evidence deliverate tactical maneuvering on the part of the Lockes. See Collins v. Seaboard Coastline Railroad Company, 681 F.2d 1333 (11th Cir. 1982) (emphasizing importance to question of non-party spousal preclusion of whether wife could easily have joined in husband's earlier lawsuit and whether wife was in effect playing a "wait and see" game with the judicial process).

It is significant that J. N. Locke's only claim to an interest in the trust property is the identical interest which C. A. Locke represented in the earlier suit, i.e., the entireties interest arising from the October 28, 1974

agreement for deed. The Court is mindful of the close personal relationship between the parties to this lawsuit and their continuing efforts to delay and defeat Mesa's rights. J. N. Locke stands in precisely the same position now as if she had always been a party to this action; and her acts, or lack thereof, during the seven year pendency of Case No. 75-28-Civ-Oc prior to her state court suit clearly indicate that she impliedly consented to allowing her husband to represent all the interests arising from the agreement for deed and that she has fully ratified his actions.

The testimony proffered at the December 6, 1982 hearing only reinforces this conclusion. J. N. Locke emphasizes the testimony of herself and her husband that she did not personally participate in the previous suit and did not

authorize anyone to represent her in that suit. (Transcript, p. 75, L. 15 et. seq.; p. 84, L. 16 et. seq.) This, however, goes only to whether the Lockes had an express representation agreement; a legal relationship in which a party is accountable to a non-party for purposes of preclusion may be implied from the totality of circumstances regardless of whether the parties entered into a formal representation agreement. Pollard v. Cockrell, supra; Restatement, Second, Judgments §40 Comments a & b. See Cotton v. Federal Land Bank, supra; Cleckner v. Republic Van Lines, supra; Fleming v. Cooper, supra. The testimony J. N. Locke stresses is, in fact, entirely consistent with the Court's finding of an implied agreement when considered in light of other testimony which Mr. and Mrs. Locke proffered concerning the history of their

marriage and their business and property dealings.

The Lockes have been married since 1945. During most of their marriage Mrs. Locke has been employed as a freight agent by the Seaboard Coast Line Railroad at its office in Plymouth, Florida, while Mr. Locke has operated and managed the family farm. Over the years J. N. Locke has uniformly relied upon C. A. Locke's judgment in all decisions concerning their business dealings and real property transactions and in managing her interest in such business and property. (Transcript, p. 91, L. 16 et. seq. (testimony of J. N. Locke)). Thus, Mrs. Locke has typically and routinely assumed a passive role, allowing her husband, in effect, to act as her agent or alter ego in business and property matters, and particularly in the business and property

matters connected with this litigation. Against such a background, revealed in the Lockes' own testimony, evidence that Mrs. Locke did not expressly authorize her husband to represent her does not controvert the Court's finding of an implied agreement of Mrs. Locke to be bound by the results of her husband's case.

ii. Conduct Inducing Reliance

A second basis for holding that J. N. Locke is now bound by the judgment in 75-28-Civ-Oc is that her conduct reasonably induced Mesa to believe that she would not pursue this matter in the state court action or in the present litigation. As discussed above, it was a common practice of C. A. Locke, ratified by J. N. Locke, to act as Mrs. Locke's manager or agent in dealings with third parties, such as Mesa, concerning the

Lockes' jointly-held business and property interests. Indeed, so complete was Mr. Locke's authority over Mrs. Locke's interests that he sometimes represented their joint interests as being solely his. For instance, Mr. Locke testified that his wife was a partner in C & L Farms (Transcript, p. 87, L. 20-25), and yet in his sworn Bankruptcy petition Mr. Locke listed only C. John Coniglio and himself as partners in C & L Farms. (Plaintiff's Exhibit 3; hearing of December 6, 1982, answer to question 21). Also illustrative is C. A. Locke's financial statement to Mesa, dated May 1, 1973, in which Mr. Locke failed to disclose that his real estate holdings, listed as comprising over 80% of his net worth, were jointly owned with his wife. (Plaintiff's Exhibit 5 in Case No. 75-28-Civ-Oc).

In view of C. A. Locke's regular dealings on behalf of the joint interests of his wife and himself, it was not unreasonable for Mesa to conclude that the defenses he raised in the previous action were advanced on behalf of both himself and his wife. Indeed, it is apparent from the orders entered in that case that this Court and the Court of Appeals were under a similar impression.

In comment c to §62 of the Restatement, Second, it is stated:

> [T]he circumstances that persons have a close legal relationship with each other (such as husband and wife or owners of concurrent interests in property), ... by itself does not justify imposing preclusion on one of them on the basis of a judgment affecting the other. But preclusion can properly be imposed when the claimant's conduct induces the opposing party reasonably to suppose that the litigation will firmly stabilize the latter's legal obligations.

Even if Mrs. Locke' subjective intention was to the contrary, by allowing Mesa to suppose that she would abide by the outcome of the first suit, she has created a reliance interest that she should not now be permitted to destroy. See Cleckner v. Republic Van Lines, supra. In this case, Mesa's reliance interest in the previous judgment is especially high in view of the Fifth Circuit's affirmance of that judgment, the extensive litigation required of Mesa to obtain and enforce that judgment, and the lengthy repose J. N. Locke has permitted before attempting to challenge that judgment. See Aerojet-General Corp. v. Askew, 366 F. Supp. 901, 911 (N.D. Fla. 1973), aff'd 511 F.2d 710 (5th Cir.) cert. denied 423 U.S. 908 (1975).

J. N. Locke suggests that if Mesa sought to bind her under the previous

judgment it should have joined her as a party. Mesa had no reason for joining J. N. Locke in that suit, however, since its dealing were with C. A. Locke and since the September 14, 1974 deed extinguished the Lockes' estate and transferred their interest to Coniglio. See Cotton v. Federal Land Bank of Columbia, supra; Fleming v. Cooper, supra. Rather, given that Mrs. Locke was fully advised of the prior suit and its potential consequences but took no action to intervene until it had run its full (seven year) course, the Court feels justified in binding the judgment therein upon Mrs. Locke as if she had appeared, especially since the only interest she now asserts is identical to that previously asserted by her husband. See Howe Coal Co. v. Prairie Coal Co., 362 F. Supp. 1117 (W.D. Ark. 1973); Lichtenberg v. Sachs, 200 Md.

145, 88 A.2d 450 (1952); Adams v. Wood, 128 Ark. 441, 194 S.W. 849 (1917); Cf., Ohio v. Kentucky, 410 U.S. 641 (1973).

b. Doctrine of Laches

Assuming in the alternative that J. N. Locke was not virtually represented by her husband in the prior suit, Mesa contends that her claim for equitable relief from this Court's judgment is barred by laches. Although J. N. Locke did not name Mesa as a party to her state court suit against Coniglio as constructive trustee, Mesa clearly is the real party in interest, since Coniglio holds the trust property solely for Mesa's benefit. Rather than seeking intervention in the state court suit, Mesa properly filed the instant suit seeking to protect and effectuate its rights under the prior decrees of this Court. 28 U.S.C. §2283; see Order

granting preliminary injunction, filed herein on May 6, 1982, at 8-9. Consequently, the question of laches is properly before this Court.

The doctrine of laches as applied by Florida courts embodies the principle that equity protects only the vigilant; it is the equitable correlate of limitations of actions at law and does not equate with the doctrine of res judicata. Shew v. Kirby, 135 So.2d 770 (Fla. 2d DCA 1961). The following elements are necessary to establish laches as a bar to relief: (1) conduct by the party against whom relief is sought giving rise to the situation of which the complaint is made; (2) delay by the claimant in asserting his rights when he had knowledge or notice of the adverse party's conduct and an opportunity to institute the suit; (3) lack of knowledge

or notice on the part of the adverse party that the claimant would assert the right on which he bases his suit; and (4) injury or prejudice to the adverse party in the event relief is accorded to the claimant. Van Meter v. Kelsey, 91 So.2d 327, 330-31 (Fla. 1956); Niagara Fire Insurance Co. v. Allied Electrical Co., 319 So.2d 594 (Fla. 3d DCA 1975).

In this case, J. N. Locke seeks to challenge this Court's order of December 26, 1978 establishing the constructive trust in favor of Mesa on the ground that her entireties interest in Tract 1 is superior to that of Mesa. This Court's order of January 25, 1982 directing Coniglio to liquidate the trust property, which Mrs. Locke seeks to obstruct, merely enforces Mesa's rights under the order of December 26, 1978, which rights in turn flow from the judgment of October

13, 1978. Mesa's "conduct . . . giving rise to [this] situation" was its alleging (in Count IV of the Complaint in 75-28-Civ-Oc., filed July 1, 1975) and subsequently demonstrating to this Court's satisfaction that the Lockes' September 12, 1974 conveyance to the Coniglios of their interest in the four tracts of land was fraudulent.

As noted above, J. N. Locke testified that her husband advised her of Mesa's lawsuit and explained the lawsuit to her when he was first served in July 1975. (J.N.L. Depo., P. 20, L. 21, et. seq.). Likewise, Mrs. Locke was informed of this Court's judgment against C. A. Locke in October 1978, and as modified in December 1978. (Transcript, p. 81, L. 19-21). Thus, Mrs. Locke knew or should have known as early as mid-1975, and certainly by late-1978, of the potential

adverse consequences of Mesa's claim against her husband to their property interest arising from the October 28, 1974 agreement for deed. Nevertheless, she made no attempt to personally assert her claim until April 8, 1982, when she filed the collateral suit against Coniglio.

J. N. Locke has offered no explanation or excuse for this lengthy delay in asserting her claim against Mesa; nor can this Court think of any - except the inequitable explanation that she was waiting for her husband to conclude his efforts in the first lawsuit. At no time was Mrs. Locke prevented or hindered from intervening or from filing another suit to protect her rights. Interestingly, even though Mrs. Locke learned of the Fifth Circuit's decree affirming this Court's judgment

"at about the same time [it] happened" (Transcript, p. 82, L. 1-5; the decree was issued November 3, 1981), she did not file her lawsuit until over seventeen months later. Mr. Locke, on the other hand, during that interim period was vigorously asserting before this Court the same interest which Mrs. Locke now seeks to assert. See Mesa Petroleum Co. v. Coniglio, 16 B.R. 1015 (M.D. Fla. 1982).

It is undisputed that Mesa proceeded in the previous litigation without knowledge or notice that J. N. Locke would assert her rights, if any, separate from C. A. Locke, or that she intended to wait until Mesa was about to have its claim satisfied before attempting to assert her rights. Indeed, Mesa had strong indications that Mrs. Locke would not pursue a separate claim, as has been

discussed above. J. N. Locke, personally and through her husband, had ample opportunity to advise Mesa that she would pursue her claim separately, but failed to do so.

Finally, Mesa unquestionably would be substantially injured and prejudiced if J. N. Locke were allowed to proceed with her eleventh hour suit. The litigation in 75-28-Civ-Oc on the issues herein was vigorous and thorough. The defendants in that case availed themselves of their right to appeal the Court's ruling and again vigorously challenged both the right of Mesa to the constructive trust and the superiority of that trust to the interests of the Lockes. After C. A. Locke had been granted a general release in bankruptcy, he once again challenged Mesa's entitlement to the constructive trust.

J. N. Locke now seeks yet another attempt to litigate the identical issues. Clearly, the expense of the relitigation alone would cause a substantial loss to Mesa. Moreover, Mesa has undertaken a substantial post-judgment investment of money and time in attempting to satisfy its judgment. (See Plaintiff's Memorandum, filed December 1, 1982, at 16). If J. N. Locke were afforded the relief she now requests, it would deprive Mesa of its long-established rights under the judgment and orders of this Court and would nullify Mesa's considerable post-judgment efforts and expenses.

Because Mesa has clearly demonstrated the presence of each element necessary for a finding of laches, the Court concludes that J. N. Locke's claim for relief is barred on the ground of laches.

5. RULE 60(b) MOTIONS

The Court now turns to J. N. Locke's motions for post-judgment relief pursuant to Rule 60(b)(4) and (b)(6). Mrs. Locke's 60(b)(4) motion is based on her claim that the former adjudications by this Court and the Court of Appeals are void with respect to herself and the properties owned by her husband and herself as an estate by the entireties. This motion merely recapitulates the defenses which the Court has ruled she is barred from raising.

As discussed above, the determination in 75-28-Civ-Oc that the September 12, 1974 conveyance was made with fraudulent intent on the part of C. A. Locke was approved by the Fifth Circuit and is now the law of the case. That conveyance, which Mr. and Mrs. Locke signed, extinguished the Lockes'

entireties estate over that property. Because J. N. Locke's entireties interest had extinguished as of September 12, 1974, she was not a necessary or indispensible [sic] party to the first action. It therefore was not improper for the Court to impose a constructive trust in the amount C. A. Locke owed to Mesa upon the interest which was conveyed to Coniglio on September 12, 1974. While J. N. Locke and her husband may have acquired a subsequent entireties interest in Tract 1 by virtue of the agreement for deed from Coniglio dated October 28, 1974, that interest was acquired subject to the beneficial interest which Coniglio constructively held for Mesa. Accordingly, the constructive trust did not empinge upon the Lockes' entireties estate, and the judgment establishing the

constructive trust is not void as to either C. A. Locke or J. N. Locke.

Furthermore, even though Rule 60(b)(4) sets forth no specific time limit for challenging a judgment on the ground that it is void, a court in equity may refuse to disturb even an allegedly void judgment where the claimant's delay is particularly flagrant and unjustified and the adverse party's reliance interest in the former adjudication is especially high. See Restatement, Second, Judgments §74. The Court finds that these elements are present in this case and foreclose J. N. Locke's attack on the judgment in 75-28-Civ-Oc on the ground that it is void. In addition to the considerations discussed in part 4(b) above, the Court finds it significant that the law upon which J. N. Locke bases her challenge was fully developed and established at the

time of the previous litigation (See Transcript, proceeding of December 7, 1982, p. 76-79), and thus could have been raised by Mrs. Locke personally at any time.

Lastly, J. N. Locke seeks relief from the Court's judgment of preclusion under the miscellaneous provision, Rule 60(b)(6), on the ground that any representation which might be imputed to her in Case No. 75-28-Civ-Oc was ineffective and thus equitably should not preclude her from asserting her rights in the instant litigation. In support of this ground, Mrs. Locke merely offers an interpretation of the various real estate transactions between the Lockes and the Coniglios under which she contends the transactions were not fraudulent and were unrelated to the promissory note from C. A. Locke to Mesa, she apparently feels

that the Court's failure to adopt this interpretation eo ipso demonstrates ineffective representation by C. A. Locke's attorney.

One seeking relief from the preclusive effects of virtual representation on the ground that one's interests were inadequately represented must demonstrate that the adverse party was aware of this inadequate representation. United States v. Truckee-Carson Irrigation District, State of Nevada, 649 F.2d 1286, 1307-09 (9th Cir. 1981), modified, 666 F.2d 351 (1982); Restatement, Second, Judgments §§42(1)(e), 75(2). J. N. Locke has pointed to no facts or circumstances such as would put Mesa on notice that C. A. Locke's privately retained attorneys, Mr. Ben Daniel and later Mr. John F. Russell, inadequately or ineffectively represented

the interests of the Lockes in the previous action. Accordingly, even assuming arguendo that those attorneys rendered ineffective assistance, J. N. Locke's motion for Rule 60(b)(6) relief must be denied. United States v. Truckee-Carson, etc., supra; Cf., Mekdeci v. Merrell Nat'l Laboratories, 711 F.2d 1510, 1523 (11th Cir. 1983) ("a party does not have any right to a new trial in a civil suit because of inadequate counsel, but has as its remedy a suit against the attorney for malpractice.")

6. REMAINING MATTERS

Having determined that Mesa is entitled to the declaratory and injunctive relief it requests in Case No. 82-85-Civ-Oc, the Court now turns to the various other matters which remain pending.

a. Coniglio's Motion for Clarification and Mesa's Motions Against Coniglio.

The Court agrees with Mesa that the sale of the trust property should be conducted by the United States Marshal. At the hearing of December 7, 1982, Coniglio proposed that the sale be of an entire interest in Tract 1 only. Because J. N. Locke has objected to this proposal (filed January 3, 1983) and because Mesa has requested that the sale be of an undivided one-half interest in all four tracts (Summary of Motions and Requested Relief, filed December 30, 1982), the Court declines to follow Coniglio's proposal. Accordingly, the Court shall order the Marshal to conduct a sale of an undivided one-half interest in all four tracts subject only to the lien of the Federal Land Bank Mortgage. Prior to the date of sale, the parties shall each amend and update their appraisals. Also prior to the date of sale, defendant

Coniglio shall file proof with this Court that all defects in the record title to the said property other than the Federal Land Bank mortgage have been cured. This dispenses with Coniglio's Motion for clarification of the order directing sale, filed March 24, 1982, and Mesa's Motion to direct Coniglio to correct record defects, filed May 14, 1982.

In its motion to cite Coniglio in contempt, Mesa asks for reimbursement of the costs and attorney's fees it has incurred in litigating the said motions by and against Coniglio, pursuant to Rule 70, based on Coniglio's failure to abide by the Court's directives that he not further encumber or convey the trust property (Order of December 26, 1978, para. 3) and that he conduct a public sale of that property (Order of January 25, 1982). Because the language of the

Court's Order of January 25, 1982 was arguably ambiguous, the Court shall not grant attorney's fees to Mesa with respect to Coniglio's motion for clarification of that order.

Mesa's motion to direct Coniglio to correct record defects, however, is quite another matter. It is unquestionable from the testimony of Coniglio on December 7, 1982 and the deposition of his son, C. John Coniglio, Jr., taken November 29, 1982 (which was admitted into evidence at the December 7, 1982 hearing; Transcript, p. 17, L. 18-19), that the complained of encumbrance (a mortgage to the Southeast Bank of Wildwood encumbering Tract 1) and conveyance (a deed for title to Tracts 2, 3 and 4 from Coniglio to Coniglio, Jr. as trustee of the C. John Coniglio Revocable Trust) occurred with the full knowledge

of defendant Coniglio, either at the time of execution or shortly thereafter. Despite Mesa's protestations, Coniglio did not obtain a satisfaction of the mortgage until December 6, 1982, the date of the evidentiary hearing before Judge Scott (defendant's exhibit C); and the Court has received no verification that the satisfaction has since been recorded, or that Coniglio has removed Tracts 2, 3 and 4 from the Coniglio Revocable Trust. Consequently, the Court finds that Coniglio is or has been in contempt of this Court's order, and shall direct that he correct the defects in the record title to the trust property and pay Mesa reasonable attorney's fees and costs incident to their motions against Coniglio, filed May 14, 1982 and November 22, 1982.

b. Mesa's Motions for Attorney's Fees and Costs.

On October 8, 1982, Mesa filed a motion to tax costs against C. A. Locke in connection with the proceedings on its Motion for an order clarifying the duties of Coniglio, filed April 27, 1981. Because Mesa prevailed in that matter, and because C. A. Locke has filed no opposition to the Motion for costs, the Court shall award the amount requested $137.00, and shall include such costs within the constructive trust created herein.

Also on October 8, 1982, Mesa filed a Motion for Attorney's fees. Clearly Mesa is entitled to reasonable attorney's fees from C. A. Locke over and above the $50,000 awarded in the order of December 26, 1978 for its post-judgment efforts to collect on the judgment against C. A.

Locke, by virtue of the terms of the underlying note.

In addition, Mesa seeks costs and reasonable attorney's fees from J. N. Locke for the proceedings in Case No. 82-85-Civ-Oc-16. As the prevailing party, Mesa is entitled to statutory costs. Mesa claims it is entitled to attorney's fees pursuant to §57.105, Fla. Stat., inasmuch as "there was a complete absence of a justiciable issue of law or fact raised by the losing party." Despite the substantial confusion generated by J. N. Locke's persistant [sic] mischaracterization of the issues involved, the Court agrees with Mesa that J. N. Locke's claim to have an interest in Tract 1 arising from the October 28, 1974 agreement for deed which defeats Mesa's interest in that property arising from the constructive trust is devoid of

merit. This conclusion is reinforced by the Court's finding in Part 4(a), ante., that in previously asserting the identical claim before this Court, C. A. Locke virtually represented J. N. Locke. The Court therefore holds that Mesa is entitled to reasonable attorney's fees from J. N. Locke in Case No. 82-85-Civ-Oc-16. Alternatively, in view of the finding that J. N. Locke has acted as C. A. Locke's alter ego in these proceedings, see ante., pp. 25-26, the Court holds that Mesa is entitled to attorney's fees pursuant to the terms of C. A. Locke's promissory note.

Since Mesa's expenses were reasonably incurred to preserve the constructive trust created by this Court, the awards of attorney's fees and costs against C. A. Locke and J. N. Locke shall be secured by the constructive trust.

The attorneys for Mesa shall forthwith submit affidavits itemizing work done and time involved in the matters specified above (including attorney's fees for the motions against Coniglio), along with affidavits of at least two attorneys who engage in similar practice estimating the amount of reasonable fees in accordance with the requirements of Florida law. Opposing parties will then be allowed to respond, and the Court thereafter will fix the amounts to be awarded.

c. Coniglio's Motion for Attorney's Fees and Costs.

Finally, defendant Coniglio has moved for attorney's fees and costs in connection with his duties as constructive trustee. The Court's order of January 25, 1982 stated that assuming Mesa's judgment against C. A. Locke was satisfied from the sale proceeds, any remaining funds would be placed in the

court registry and the Court would consider Coniglio's claim for attorney's fees and costs.

Under Florida law, when a trustee seeks to charge a trust corpus with an expense incurred by him, including attorney fees,

> the burden of proof is upon the trustee to demonstrate that the expense was reasonably necessary and that such expense was incurred for the benefit of the trust, and not for his own benefit nor the benefit of others.

Ball v. Mills, 376 So.2d 1174, 1179 (Fla. 1st DCA 1979); Barnett v. Barnett, 340 So.2d 548 (Fla. 1st DCA 1977). The Court, therefore, shall allow Coniglio to submit affidavits itemizing costs and estimating reasonable attorney's fees provided that such expenses are demonstrated to have been reasonably necessary and incurred solely for the benefit of the trust. Such submissions

may be filed at any time on or before twenty (20) days after the sale of the trust property, and opposing submissions may be filed within ten (10) days thereafter. Coniglio's award will then be set by the Court, to be satisfied out of sale proceeds following satisfaction of the judgment for Mesa.

In accordance with the foregoing, it is

ORDERED and ADJUDGED:

1. The motion of plaintiff Mesa Petroleum Company for Judgment in Case No. 82-85-Civ-Oc is hereby granted.

2. Judgment in Case No. 82-85-Civ-Oc is hereby entered in favor of plaintiff Mesa Petroleum Company in accordance with the following terms:

a. The rights of plaintiff Mesa Petroleum Co. in the real property forming the res of the constructive

trust created by this Court in Case No. 75-28-Civ-Oc by order dated December 26, 1978, to wit: an undivided one-half interest in the following parcels of real property:

TRACT NO. 1: NE ¼ less North ½ of NE ¼ of NE ¼ and NE ¼ of SE ¼ and East ½ of NW ¼ and NE ¼ of SW ¼ and West ½ of NW ¼ of SE ¼, all in Section 22, Township 18 South, Range 22 East, and SE ¼ of SE ¼ of SW ¼, Section 15, Township 18 South, Range 22 East;

TRACT NO. 2: East ½ of SW ¼ less begin at NW corner of NE ¼ of SW ¼; run South 416 feet; East 208 feet; North 416 feet; West 208 feet to the point of beginning, and SW ¼ of SE ¼ and East ½ of SW ¼, all in Section 33, Township 18 South, Range 23 East;

TRACT NO. 3: West ½ of West ½ of Section 34, Township 18 South, Range 23 East; and NW ¼ of NW ¼, Section 3, Township 19 South, Range 23 East; and East ½ of NE ¼ of NE ¼, Section 4, Township 19 South, Range 23 East;

TRACT NO. 4: East ½ of SE ¼, Section 33, Township 18 South, Range 23 East.

are declared to be superior to the rights of each and every defendant herein, individually or jointly, and superior to the rights of any person claiming by, through or under any such defendant, in the said property.

b. Defendant Jay Nell Locke and Defendant C. John Coniglio are hereby ordered to dismiss with prejudice the suit defendant Jay Nell Locke filed in the Circuit Court of the Fifth Judicial Circuit of Florida in and for Sumter County, Case No. 82-125-CA, and to cancel the Lis Pendens filed therein, on or before thirty (30) days after the date of this order.

3. The ore tenus motion of defendant Jay Nell Locke for relief from the judgments and rulings of this Court in the above-entitled consolidated cases, pursuant to Federal Rule of Civil

Procedure 60(b)(4) and (b)(6), is hereby denied.

4. The motion of plaintiff Mesa Petroleum for order directing defendant C. John Coniglio to correct defects in record title, filed May 14, 1982, is hereby granted. Defendant C. John Coniglio is hereby ordered forthwith to obtain the execution of whatever instruments are necessary to cause the record title to Tracts 2, 3 and 4, as more fully described in paragraph 2(a) above, to be vested in himself without encumbrance by the Coniglio Revocable Trust; and to satisfy, of record, the mortgage to the Southeast Bank of Wildwood encumbering Tract No. 1; and to file proof of compliance with the foregoing with this Court on or before thirty (30) days after the date of this order.

5. The motion of plaintiff Mesa Petroleum to cite defendant C. John Coniglio in contempt, filed November 22, 1982, is hereby granted in part, pursuant to Federal Rule of Civil Procedure 70, as follows:

a. The public sale of the real property forming the res of the constructive trust shall be conducted by the United States Marshal in accordance with the provisions of this order.

b. Plaintiff Mesa Petroleum Company is awarded costs and reasonable attorney's fees from defendant C. John Coniglio in connection with plaintiff's motions against defendant Coniglio, filed May 14, 1982 and November 22, 1982, the amount of which shall be determined in a subsequent Court order.

6. The motions of plaintiff Mesa Petroleum Company for costs and reasonable attorney's fees against defendants Coy Aldridge Locke and Jay

Nell Locke, filed October 8, 1982, are hereby granted. The amount of such award shall be set in a subsequent Court order and shall be secured by the constructive trust created by this Court in Case No. 75-28-Civ-Oc.

7. The attorneys for plaintiff Mesa Petroleum Company are hereby directed to file affidavits in support of Plaintiff's Motion for attorney's fees, on or before twenty (20) days after the date of this order, pertaining to work done and time spent in preparation for and litigation of the following:

a. Post-judgment proceedings against defendant C. A. Locke in Case No. 75-28-Civ-Oc.

b. Proceedings against defendant J. N. Locke in Case No. 82-85-Civ-Oc-16.

c. Motions against defendant Coniglio filed by Mesa herein on May 14, 1982 and November 22, 1982.

The affidavits shall be accompanied by affidavits of at least two non-associated practicing attorneys providing estimates of reasonable attorney's fees in accordance with Florida law as to each of the above. Other parties may file responsive submissions within ten (10) days thereafter. The Court will fix the amount of attorney's fees owed to Mesa by the respective defendants in a subsequent order.

8. The United States Marshal is hereby directed to sell an undivided one-half interest in the parcels of real property more fully described in paragraph 2(a) above, which interest shall be sold subject to the security interest of the Federal Land Bank of Columbia, South Carolina, in accordance with the provisions of this order.

9. The public sale shall be conducted in accordance with 28 U.S.C. §2001(a), either as a whole or by separate tracts, at the front steps of the Sumter County Courthouse within the legal hours of sale on a date to be set by the United States Marshal within ninety (90) days after the date of this order.

10. The United States Marshal is hereby directed to publish a notice of sale once a week for four (4) consecutive weeks prior to sale in the Sumter County Times, in accordance with 28 U.S.C. §2002.

11. Prior to sale, C. John Coniglio and Mesa Petroleum Company shall each employ a disinterested person to appraise the property as encumbered by the security interest of the Federal Land Bank of Columbia, South Carolina. The

property shall be appraised both as a whole and as to each individual tract.

12. The sale of the property shall be to the best and highest bidder for cash; provided, however, that no offer shall be accepted that is less than two-thirds of the mean appraised value of a one-half interest in the property as a whole or the particular individual tract being bid upon. The "mean appraised value" is to be derived by averaging the figures of the appraiser employed by C. John Coniglio and the appraiser employed by Mesa Petroleum Company.

13. The United States Marshal shall promptly make a report of his sale to this Court for an order of confirmation. Upon such confirmation, the Marshal shall disburse the proceeds of the sale as follows:

First: To the plaintiff, Mesa Petroleum Company, up to and

including an amount sufficient to satisfy its total claim against C. A. Locke arising out of this Court's judgment of October 13, 1978 and order of December 26, 1978, less the amount awarded plaintiff by the Bankruptcy Court by order of May 7, 1980 plus interest thereon; and an amount sufficient to satisfy plaintiff's award of post-judgment costs and attorney's fees against C. A. Locke in Case No. 75-28-Civ-Oc-16 and against J. N. Locke in Case No. 82-85-Civ-Oc, which award shall be set by a subsequent order of the Court.

Second: To the Marshal for his costs and expenses incurred in connection with this cause and the sale hereinabove ordered.

Third: The balance, if any, is to be deposited in the registry of this Court, in which event the Court will consider the claims of defendant C. John Coniglio for costs and attorney's fees demonstrated to be reasonably necessary and incurred solely for the benefit of the trust. Coniglio may submit affidavits in support of such claims on or before twenty (20) days after the date of sale. Other interested parties may file responsive submissions

within ten (10) days thereafter.

14. That upon confirmation of the aforesaid sale, the United States Marshal shall execute and deliver a good and sufficient Marshal's Deed conveying the property sold to the purchaser(s) thereof; and the said purchaser(s) or their authorized agent shall thereupon, without delay, be let into possession of the property so conveyed.

15. This Court retains jurisdiction of this cause for the purpose of entering such further orders as may be necessary and just, including the entry of an order confirming the sale.

DONE, ORDERED and ADJUDGED in Chambers at Jacksonville, Florida, this 12th day of March, 1985.

JOHN H. MOORE, II
UNITED STATES DISTRICT
JUDGE

MESA PETROLEUM
COMPANY, Plaintiff,

v.

C. John CONIGLIO, et al., Defendants.

MESA PETROLEUM COMPANY,
Plaintiff-Appellee,

v.

Jay Nell LOCKE, Defendant-Appellant,

and

C. John Coniglio, Defendant.

No. 85-3386.

United States Court of Appeals,
Eleventh Circuit.

April 28, 1986.

Robert E. Austin, Jr., Leesburg, Fla., for defendants.

Stephen A. Hould, Jacksonville, Fla., Neil Bowman, Amarillo, Tex., for Mesa.

Steven Gray, Ocala, Fla., for Coniglio.

Appeal from the United States District Court for the Middle District of Florida.

Before JOHNSON and HATCHETT, Circuit Judges, and MURPHY, District Judge.

HATCHETT, Circuit Judge:

In this diversity action involving Florida real property, we hold that a party voluntarily destroyed a claimed interest in the subject real property, and that a successor judge properly entered judgment after a previous judge announced findings of fact and conclusions of law. We affirm.

I. The Transactions

Between 1966 and 1970, C. A. and Jay Nell Locke, his wife, jointly with C. John Coniglio and Mary Jean Coniglio, his wife, acquired title to four tracts of real property in Florida. In the early '70's, the husbands, acting as shareholders of Diamond T Cattle Co., Inc. (Diamond T), a Florida corporation, entered into a joint venture with Mesa

Petroleum (Mesa) through which they incurred debts to Mesa. Both husbands signed personal promissory notes payable to Mesa.

On September 12, 1974, C. A. and Jay Nell Locke executed a warranty deed conveying all their right, title, and interest in the four tracts to C. John and Mary Jean Coniglio. This transaction occurred only four days before the husband signed the promissory notes to Mesa. On October 28, 1974, the two couples took three actions in connection with what Jay Nell Locke contends was a refinancing and partition arrangement. First, the September 12, 1974, Deed to the Coniglios was recorded in the public records of Sumter County, Florida. Second, a mortgage from the Coniglios to the Federal Land Bank on the four tracts of land was also recorded in the public

records of Sumter County. Third, the Coniglios and Lockes executed an Agreement for Deed relating to Tract I of the four tracts, the effect of which was to leave title of Tract I in the Coniglios until the Lockes paid the Coniglios $217,678. This Agreement for Deed was never recorded.

In 1978, the district court found that the conveyance of the four tracts of land by the September 12, 1974, Deed was for the purpose of defrauding Mesa, and it imposed a constructive trust.

II. The Cases

A. Case No. 75-28

In No. 75-28, Mesa obtained a judgment against C. A. Locke and John Coniglio for debt. The district court first announced that it would set the September 12, 1974, conveyance aside and place a lien favoring Mesa on the tracts

of real property. On being advised of the Florida law concerning entirety property, the district court issued an order requiring Coniglio to hold all the tracts of real property, including Tract I, in trust for Mesa. The order provided that the trust was subject only to the security interest of the Federal Land Bank of Columbia, South Carolina. The order also prohibited Coniglio from further encumbering or conveying the property. The court of appeals affirmed on the ground that the Florida courts had long recognized the equitable remedy used by the district court. Mesa Petroleum Co. v. Coniglio, 629 F.2d 1022, 1030 (5 Cir. 1980) (citing Bell v. Smith, 32 So.2d 829 (Fla. 1947)).

B. Case 82-85

When Mesa began efforts to collect its judgment in 75-28, Jay Nell Locke and

C. A. Locke sought to block the efforts. C. A. Locke attempted to assert a bankruptcy discharge as a bar to enforcement of the constructive trust. The district court rejected this effort and ordered Coniglio to sell the property for the benefit of Mesa. See Mesa Petroleum Co. v. Coniglio, 16 B.R. 1015, 1020 (M.D. Fla. 1982).

As the sale approached, Jay Nell Locke filed an action in state court. She claimed an ownership interest in the property as a tenant by the entirety arising from the unrecorded Agreement for Deed dated October 28, 1974, as well as from her original ownership. She sought to enjoin Coniglio from carrying out the sale of Tract I pursuant to the district court's order.

Mesa filed suit in the district court seeking to enjoin Jay Nell Locke

and Coniglio from proceeding with the state court action. In the federal suit, Mesa sought a declaratory judgment that its rights to the real property in the constructive trust were superior to the rights, if any, of Jay Nell Locke. Mesa also asked the court to consolidate the original case (75-28) with Mesa's action for injunction.

The district judge in 82-85 was The Honorable Charles R. Scott, the same judge who had presided in 75-28. The court consolidated the cases, and on December 6 and 7, 1982, it held a hearing. At the beginning of the hearing, the court announced findings of fact and conclusions of law, ruling in favor of Mesa. The court stated that it had already considered the claim that the Agreement for Deed involving Tract I created an entirety interest in Tract I,

and had concluded that any such interest was subject to the constructive trust. The court concluded that because the positions of C. A. Locke and Jay Nell Locke were identical, C. A. Locke adequately represented Jay Nell Locke. The court also concluded that there was an implied agreement of Jay Nell Locke to be represented by C. A. Locke in the previous litigation, or to be bound by the results. Further, the court concluded that under the totality of the circumstances, Mesa had a justified expectation that Jay Nell Locke would be bound. The court also concluded that Mesa was substantially prejudiced by Jay Nell Locke's delay in asserting her claim and that the delay was unjustifiable in view of Jay Nell Locke's admission that she was aware of the litigation from its outset in 1975.

The court allowed Jay Nell Locke to proffer testimony in support of a rule 60(b)(4) and 60(b)(6) motion to set aside the order of preclusion as well as the earlier orders and judgments entered in 75-28. Jay Nell Locke offered an abstract of title to the properties, the October 28, 1978, Agreement for Deed, and her deposition.

Judge Scott stated in open court that he felt he had a better understanding of the case than before it was appealed. He concluded by saying:

> It looks like I've got some work to do to start out 1983. And Hopefully I'll come up with the right decision at some appropriate time.

Judge Scott died before he could render a final decision. The case was reassigned to Judge John H. Moore, II. In July, 1983, Mesa filed a motion for entry of judgment. On March 12, 1985,

the district court rendered a final summary judgment in favor of Mesa.

III. Issues

We must decide three issues. First, did Judge Scott's oral pronouncement of findings of fact and conclusions of law suffice to authorize Judge Moore to enter a final judgment, and decide rule 60(b) motions for relief from judgment? Second, did the distract court correctly bar Jay Nell Locke from litigating her claim to an entirety interest? Third, did the district court properly award attorney's fees to Mesa?

IV. Authority of Successor Judge to Enter Order

A. Summary of Contentions

Federal Rule of Civil Procedure 63 allows substitution of a judge upon disability only "after a verdict is returned or findings of fact and conclusions of law are filed." Jay Nell

Locke contends that Judge Scott's announcement of his intended findings and conclusions did not meet the requirements of Rule 52 of the Federal Rules of Civil Procedure. Under rule 52, findings of fact and conclusions of law are sufficient if "stated orally and recorded in open court following the close of evidence." Jay Nell Locke contends that Judge Scott received evidence in the hearings on December 6 and 7 that bore upon and altered his understanding of the case. Jay Nell Locke cites Arrow-Hart, Inc. v. Philip Carey Co., 552 F.2d 711 (6th Cir. 1977) for the principle that a successor judge may not enter judgment in the absence of unanimous agreement of the parties where the disabled judge did not satisfy the requirements of rule 52.

Mesa replies that Judge Scott announced extensive findings of fact and

conclusions of law in open court and that the hearing on December 6 and December 7 concerned only Jay Nell Locke's motion for relief from the order of preclusion pursuant to rule 60. Mesa argues that the motion merely duplicated what had previously been argued and presented on the issues. Mesa suggests that Judge Scott's comment that he understood the case better than before after the two days of hearings resulted from the presence in the hearing of issues other than those concerning the order of preclusion.

B. Discussion

[1,2] For two reasons, Judge Moore had authority to enter judgment. First, Judge Scott had already drafted an order which he read orally in open court. We are not cited authority showing that the taking of evidence pursuant to a rule

60(b) motion after the oral pronouncement of findings and conclusions deprives the findings of fact and conclusions of law of legal authority. More important, the resolution of the case on summary judgment distinguishes this case from holdings cited by Jay Nell Locke that involved a bench trial in progress upon the death of the presiding judge. Where a successor judge considers a transcript as "supporting affidavits," an award of summary judgment is appropriate if there is no genuine issue as to any material fact. See Bromberg v. Moul, 275 F.2d 574, 576 (2d Cir. 1960). The issues decided by Judge Moore were legal issues based upon an undisputed factual record.

We hold that Judge Moore properly entered summary judgment as successor to Judge Scott.

V. Jay Nell Locke's Claim to an Entirety Interest

A. Contentions

Jay Nell Locke argues that the district court holdings deprive her of due process by denying her a hearing on her property interests. She argues that an entirety interest is not subject to the individual debts of one spouse absent the joinder of the other spouse in the underlying lawsuit. She argues that the October 28 transaction was a financing arrangement and points to the district court's sustaining of the Land Bank's mortgage as evidence supporting this theory.

Regarding the original entirety interest, Locke argues that the court of appeals erred in finding fraud and in imposing a constructive trust on this real property. Locke argues that a

constructive trust only exists to prevent unjust enrichment and that Mesa could not have reached the property for satisfaction of its judgment because it was exempt. Thus, Jay Nell Locke's case rests, in part, on a claim that the court of appeals erred.

Mesa's argument is that Jay Nell Locke conveyed her entirety interest; she lost it at the point that she conveyed it; Mesa gained an interest by operation of law; it was then too late for the Coniglios to reestablish the entirety interest through an Agreement for Deed.

Jay Nell Locke responds that the delivery of the Deed to the Coniglios, the event creating the constructive trust, may have occurred simultaneous with the reconveyance of Tract I to the Lockes by Agreement for Deed. Mesa argues that Jay Nell Locke should be

bound to the results of C. A. Locke's litigation in Case 75-28, in which C. A. Locke made a tenancy by entirety argument and either did raise or could have raised the theory that the October 28 Agreement for Deed did not chronologically follow the constructive trust. Jay Nell Locke does not attack the district court's factual findings that her conduct showed agreement to be bound and that she induced reliance by Mesa; instead, she attempts to distinguish the legal authority on which the court relied to find that C. A. Locke represented her interests.

B. Discussion

[3] The rationale for imposing a constructive trust was that Jay Nell Locke voluntarily destroyed her entirety interest by conveying it to the Coniglios. Thus, the destruction of the

entirety interest did not violate the rule that neither spouse may sell, forfeit, or encumber any part of the estate without the consent of the other. See Smith v. Hindery, 454 So.2d 663 (Fla. 1st DCA 1984). Even though the automatic destruction of the entirety interest required court recognition before a legally enforceable beneficial interest could arise in Mesa, recognition of that beneficial interest did not prejudice Jay Nell Locke. She had lost her claim to the land based on the 1969 and 1970 purchases.

Locke cites Ellis Sarasota Bank & Trust v. Nevins, 409 So.2d 178 (Fla. 2d DCA 1982) for the principle that even if fraud was present, Mesa was required to join her as a party in order to reach the entirety interest.

[4] Ellis stands for a narrower principle - that a plaintiff must join both tenants before an entirety account can be made available to answer for the judgment debts of one of the tenants. 409 So.2d at 182. Any claim that Jay Nell Locke might make to Tract I based on her 1970 purchase was too attenuated to have required her joinder before the court could impress a trust on it. Indeed, the court of appeals in effect reached this conclusion by holding that the equitable remedy was available despite the status of the Lockes as tenants by the entirety.

[5] The second alleged entirety interest is that which Jay Nell Locke argues was created in Tract I by the October 28, 1974, Agreement for Deed with the Coniglios. Mesa's primary argument is that Locke is seeking to expand her

ownership rights to include Mesa's beneficial interest, which preceded whatever entirety interest was created by the October 28, 1974, transaction. We agree that any entirety interest created on October 28, 1974, was subject to Mesa's equitable interest imposed in 75-28.

Jay Nell Locke additionally argues that the court of appeals simply erred in imposing the trust, not because she was not joined, but because the finding of fraud is inconsistent with the character of an entirety interest, which Mesa could not have reached. We reject this argument. No reason exists to open or attempt to reverse the decision and judgment of the Fifth Circuit in 75-28.[1]

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[1]In analyzing the rule 60(b) motion,
(Footnote Continued)

Finally, Jay Nell Locke suggests different evidence might lead to a different decision. Only if Jay Nell Locke were treated as a stranger to 75-28 could she properly offer additional evidence as a basis for altering the decision of the court. The district court concluded that Jay Nell Locke implicitly agreed to be bound by the first decision and induced Mesa to believe it could rely on the adjudication without her joinder. On this basis, the

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(Footnote Continued)
the district court based its reasoning on a law of the case rationale, rather than preclusion. Thus, the district court considered whether a good reason to disregard the decision of the court of appeals existed. The district court found that the court of appeals decided correctly and that Locke's delay in seeking to challenge the judgment did not commend her to equity. In reaching this conclusion, the district court afforded Jay Nell Locke merits consideration.

court concluded she is not entitled to relitigate.

Although Florida law governs the relative property interests, federal law governs the preclusion principles in this diversity action. Aerojet-General Corp. v. Askew, 511 F.2d 710, 715-18 (5th Cir.), cert. denied, 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975). In the Eleventh Circuit, virtual representation can be inferred from the conduct of the parties. See Cotton v. Federal Land Bank of Columbia, 676 F.2d 1368 (11th Cir. 1982); Cleckner v. Republic Van and Storage Co., Inc., 556 F.2d 766, 770-71 (5th Cir. 1977). When a case goes to trial, the question of whether a party is virtually representative of the interest of a non-party is one of fact for the district court. Astron Industrial Associates, Inc. v. Chrysler Motors

Corp., 405 F.2d 958 (5th Cir. 1968). See also Drier v. Zarpon Oil Company, 552 F.2d 199 (5th Cir. 1975) (finding lack of genuine issue on summary judgment). This case was decided on a motion for summary judgment. Locke does not dispute the factual record of her conduct. Instead, she wishes to avoid the legal effect assigned to it by the district court.

[6] The court also ruled that the question of laches was properly before the court because Locke sought an equitable remedy in the state court. The district court stated that Locke knew or should have known as early as mid-1975, and surely by late 1978, the potential adverse effect the transactions in September and October, 1974, could have on her entirety interest. Yet, she made no attempt to assert her claim until April 8, 1982, after her husband had made

identical arguments both in the original case and in his own bankruptcy case. The court also noted that Jay Nell Locke offered no explanation for her long wait. We hold that the district court correctly found that, to the extent Jay Nell Locke sought to raise a new theory of the October 28 transaction, her conduct did not entitle her to litigate it.

We have held the following: First, the imposition of the trust did not affect Jay Nell Locke's original entirety interest because she had conveyed it; we will not disturb the previous court of appeals decision. Second, Jay Nell Locke fails on the merits in seeking to claim an entirety interest based on events after the constructive trust attached. Third, Jay Nell Locke is precluded from raising a theory based on speculation that new evidence might show that she

revived an entirety interest before the constructive trust attached.

VI. Attorney's Fees

[7,8] The district court awarded attorney's fees on two theories. First, under section 57.105 Florida Statutes:

> The court shall award a reasonable attorney's fee to the prevailing party in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party.

The court held that the claim to an interest arising from the October 28, 1974, Agreement for Deed that could defeat the constructive trust is devoid of merit. The district court viewed the finding of virtual representation as reenforcing this conclusion.

In the alternative, the court found that Mesa was entitled to attorney's fees pursuant to the terms of C. A. Locke's

promissory note, because C. A. Locke was her alter ego.

We agree with the district court that Locke "persisted in framing an irrelevant issue" and that C. A. Locke was Jay Nell Locke's alter ego.

We affirm the district court's disposition of the merits and the award of attorney's fees to Mesa.

AFFIRMED.